1992

State of Utah v. Dennis Sessions : Brief of Appellee

Utah Court of Appeals

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0 920553 IN THE UTAH COURT OF APPEALS

OCKET NO. _____

STATE OF UTAH, :

Plaintiff/Appellee, : Case No. 920553-CA

v. :

DENNIS SESSIONS, : Priority No. 2

Defendant/Appellant. :

BRIEF OF APPELLEE

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THIS IS AN APPEAL FROM CONVICTIONS FOR TWO COUNTS OF FORGERY, SECOND DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 76-6-501 (1990), IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE RODNEY S. PAGE, PRESIDING.

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STATE OF UTAH,	:	
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v.	:	
DENNIS SESSIONS,	:	Priority No. 2
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for two counts of forgery, second degree felonies, in violation of Utah Code Ann. § 76-6-501 (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUE PRESENTED AND STANDARD OF REVIEW

Is the evidence sufficient to support the trial court's finding of guilt?

"When challenging the findings of fact of the trial court on appeal, the appellant must show that the findings of fact were clearly erroneous." State v. Moosman, 794 P.2d 474, 475 (Utah 1990). "In order to show clear error, the appellant must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack." Id. at 475-76. This Court will reverse the trial court's finding of

guilt only if it is "against the clear weight of the evidence," or if the Court "otherwise reaches a definite and firm conviction that a mistake has been made . . ." State v. Walker, 743 P.2d 191, 193 (Utah 1987). Where, as here, defendant has failed to "marshal" the evidence in support of the trial court's findings, this Court may properly decline to consider his argument. Crookston v. Fire Insurance Exchange, 817 P.2d 789, 800 (Utah 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202(1) (1990); theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1990); and two counts of forgery as second degree felonies, in violation of Utah Code Ann. § 76-6-501(1)(b) & (3)(b) (1990) (R. 9-13).

Following a bench trial, defendant was convicted as charged on the forgery counts. The remaining charges were dismissed due to insufficient evidence (Transcript of Bench Trial, 2 July 1992, [T.] at 129; R. 26).

The trial court sentenced defendant to two concurrent terms of one to fifteen years in the Utah State Prison (R. 34-35). See also Second Amended Commitment to Utah State Prison,

filed September 16, 1993, which has not been numbered in the record.

STATEMENT OF THE FACTS

Burglary and Theft

Kathleen Cline's wallet was stolen from her Bountiful, Utah home on April 24, 1992 (T. 14-19, 128). Among the items in Mrs. Cline's wallet were $400 in cash and a checkbook containing fifteen to twenty blank checks (T. 19). Mrs. Cline discovered the theft of her wallet around noon and immediately closed her account at First Security Bank (FSB) in Bountiful (T. 20-21).

Forgeries

At 4:49 p.m. that same day, defendant cashed a check for $156 made out to him on Mrs. Cline's account at a Salt Lake City branch of FSB (T. 50; State's Exhibit #1). The memo line alleged the check was for "car repairs" (State's Exhibit #1). Dawn Arambula, the drive-up bank teller who cashed the check, first obtained identification from defendant and wrote his driver's license number on the back of the check (T. 48-50, 70; State's Exhibits ##1, 5).

At 5:11 p.m., defendant cashed another check for $156 made out to him on Mrs. Cline's account at another Salt Lake City branch of FSB (T. 52-57; State's Exhibit #2). As before, the memo line alleged the check was for "car repairs" (State's Exhibit #2). David Passey, the drive-up bank teller who cashed the second check, also obtained identification from defendant and

similarly wrote his driver's license number on the back of the check (T. 52-55, 70; State's Exhibits ##2, 5).

Defendant attempted to cash a third check made out to him on Mrs. Cline's account at yet another Salt Lake City branch of FSB; however, the bank teller, apparently noting there was a "flag on the account[,] . . . confiscated" the check and defendant's driver's license (T. 69).

Mrs. Cline was the sole holder/signatory of the FSB checking account and was not acquainted with defendant, nor had she authorized him or anyone else to write the checks on her account (T. 23).

Police Investigation

Officer Kilpack of the Bountiful City Police Department investigated the forgeries and arrested defendant and at least one other suspect, Edward Evans, for their alleged involvement in both the burglary/theft of Mrs. Cline's wallet and the subsequent forgeries (T. 58-66).[1] Defendant waived his right to remain silent[2] and was interviewed by Officer Kilpack during transport to the Davis County Jail (T. 63-65). Defendant admitted passing the checks using his own identification; however, he denied any involvement in the burglary/theft (T. 66). Rather, defendant

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[1] Evans initially implicated defendant in the burglary/theft of the wallet; however, at trial, Evans claimed he had lied about defendant's involvement and that defendant did not participate in the burglary/theft (T. 85). Although Evans admitted stealing the wallet, he denied any involvement in the subsequent forgeries (T. 84).

[2] See Miranda v. Arizona, 384 U.S. 436 (1966).

alleged that he was approached by Evans and an unidentified woman[3] while at a 7-11 store near his home (T. 66-68). According to defendant, Evans and the woman asked him to pass the checks because neither one of them had identification (T. 66). Defendant told the officer that the woman wrote out the checks and signed them "Kathleen Cline" (T. 116). Defendant said the checks were written out for $156 because "they needed approximately $300 to purchase cocaine and they also needed some gas money" (T. 68). Defendant admitted that he had a "pretty good idea" that the woman who signed the checks was not Kathleen Cline (T. 67, 117).

Trial Strategy

At trial, defendant claimed he did not suspect the checks were stolen until after the third bank teller confiscated his license (T. 120). Specifically, defendant alleged that Evans, whom he had known since childhood, offered him a ride home from the 7-11 store (T. 100). Evans introduced the woman with him as "Kathy" and told defendant that she had just left her husband (T. 101). Evans then asked defendant if he would be willing to cash one of the woman's checks so that they could "go party," as neither he (Evans) nor the woman had any identification (T. 102). The woman explained that she had no identification because she had fought with her husband and had left with nothing but her checkbook (T. 102).

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[3] Officer Kilpack had the impression that defendant really knew the woman, but never specifically identified her (T. 67).

Additionally, defendant claimed that after he cashed the first check, the woman showed him a deposit entry in the check register for $1,000 and asked if he wanted to cash a "couple of more checks" (T. 103). Defendant said, "Sure" and they "drove to another bank in Sugarhouse and cashed another check and from there it seems [sic] like we were on a roll" (T. 103). However, when the third bank confiscated his license, defendant claimed he became "very suspicious" that "[t]here was something a little more to it than what they had told [him]" (T. 104). Defendant said he asked the woman about the checking account and that she "stuck with the same story and said she had broken up with her husband and that it was her checking account" (T. 104). Defendant told the woman to drive off, and that he would get his driver's license later (T. 104).

Guilt Determination

At the conclusion of the bench trial, the court found defendant guilty of two counts of forgery. Specifically, the court found there was "no question" defendant knew the checks were stolen, "or had a good idea that they were stolen or at least did not belong to the person who was filling them out" (R. 129-30, the court's oral ruling is reproduced in Addendum A).

SUMMARY OF THE ARGUMENT

This Court should not consider defendant's challenge to the sufficiency of the evidence to support his theft conviction because defendant has not properly marshaled the evidence supporting the trial court's determination of guilt on the

charges of forgery. Even if the Court were to consider the merits of defendant's claim, there was ample evidence before the trial court to sustain its determination of defendant's guilt.

ARGUMENT

THE EVIDENCE PRESENTED AT TRIAL TOGETHER WITH ALL REASONABLE INFERENCES IS SUFFICIENT TO SUSTAIN THE TRIAL COURT'S DETERMINATION OF GUILT

Defendant contends the evidence is insufficient to support his convictions for forgery. Br. of App. at 6-7. This Court should reject defendant's challenge to the sufficiency of the evidence based on his failure to comply with the marshaling requirements of State v. Moosman, 794 P.2d 474, 476 (Utah 1990) and State v. Drobel, 815 P.2d 724, 734-35 (Utah App.), cert. denied, 836 P.2d 1383 (Utah 1991).

When challenging the findings of a trial court, it is the defendant's burden to marshal all of the evidence in support of the trial court's guilt determination and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the trial court's finding against the asserted challenge. Moosman, 794 P.2d at 476; Drobel, 815 P.2d at 734. In considering a challenge to the sufficiency of the evidence to support the trial court's findings, the reviewing court applies a clearly erroneous standard. Moosman, 794 P.2d at 475. Accordingly, the trial court's finding of guilt will be reversed only if it is "against the clear weight of the evidence," or if the Court "otherwise

reaches a definite and firm conviction that a mistake has been made . . ." State v. Walker, 743 P.2d 191, 193 (Utah 1987).

Defendant has failed to meet this purposefully heavy burden. Rather, than marshaling all the supporting evidence and then demonstrating that the court's verdict is against the clear weight of the evidence, or that the court's verdict is definitely and firmly mistaken, defendant has blended the evidence supporting the verdict with that which he believes conflicts with the verdict. In essence, defendant merely reargues the relative merits of the testimony presented below. However, this Court does not sit as the trier of fact, and defendant's attempt to reargue the evidence presented at trial is therefore not a proper method for challenging the sufficiency of the evidence. Rather,

> [i]n order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic, 818 P.2d 1311, 1315 (Utah App. 1991). Because defendant has not properly marshaled the evidence supporting the trial court's verdict, this Court should refuse to consider his challenge to the sufficiency of the evidence.

Even if the Court were to consider defendant's sufficiency challenge, there was ample evidence to support

defendant's conviction. Rather than recount the evidence supporting defendant's conviction, the State refers the Court to the Statement of the Facts at pp. 3-6, supra. Viewed in its proper light on appeal, the evidence presented at trial provides substantial support for the trial court's finding that defendant knowingly forged the checks on Mrs. Cline's account (R. 129-30), see Addendum A. This court should therefore reject defendant's sufficiency challenge.

CONCLUSION

Based on the foregoing argument, defendant's forgery convictions should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of November, 1993.

JAN GRAHAM
Attorney General

Marian Decker
MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to WILLIAM J. ALBRIGHT, attorney for appellant, 74 East 500 South, #245, Bountiful, Utah 84010, this 16th day of November, 1993.

Marian Decker

ADDENDUM A

checks were there, it would seem inconceivable to me, your Honor, that a person who was acting with that state of mind, who was innocent so to speak, wouldn't be aware rather early on that this was a crime that was being perpetrated and that he was part of the perpetration of that crime.

I would submit, your Honor, that the State has borne its burden and that the defendant should be found guilty of all four counts as charged.

THE COURT: Thank you.

The Court will rule as follows in the matter: First as to the facts that the Court would find, the Court would find that there is no question on April 24th, 1992 someone went into Mrs. Cline's home in Bountiful and took her wallet that had a certain amount of cash and some blank checks in it. The evidence indicates that the vehicle used was one which belonged to a third person who is not charged, and the evidence shows that that vehicle was seen at the location in question and that there were three individuals in that vehicle. Mrs. Cline testified that she heard the family room door -- or the door open only once. Mr. Evans's testimony is that he opened the door, saw the purse and then went back and told others and that Mr. Sessions, who was in the car, came and took the purse. Mrs. Olsen across the street testified that she saw only one person go up to the door, that that person was a person with light blonde hair

and when she described the individual to Mrs. Cline, she indicated that she thought it would be Mr. Evans.

The Court would find that the State has failed to meet its burden as to this defendant relative to the burglary or the theft. However, the Court would find that on or about the afternoon of that same day, that Mr. Evans and his female companion met the defendant, Mr. Sessions. The Court finds that at that time they requested him to cash certain checks for them. It's obvious from the checks that this is not a joint checking account such as a husband and wife would have and which would have any relevancy to any kind of a divorce. It's obvious from that. The Court further finds that there was no -- that the purported owner had no idea.

The evidence showed that they went to several banks. The first one they went to they wrote out a check for $156. They obtained that amount and in Mr. Sessions' own testimony they were on a roll at that point and decided to try again. They did, some 20 minutes later and a few blocks away, and again were able to cash another check in the amount of $156. The Court would find they tried a third time, but at that time the matter was flagged and Mr. Sessions -- excuse me, his ID was taken.

The Court would find that there is no question in the Court's mind that Mr. Sessions knew that these checks were stolen or had a good idea that they were stolen or at

least did not belong to the person who was filling them out, that he passed the checks is uncontradicted, that he obtained the money for them is also uncontradicted. The Court therefore finds that the State has met its burden as to Count 2, or excuse me, Count 3 and Count 4 of forgery, which are second degree felonies.

Mr. Sessions, would you please stand. The Court would inform you that you have a right to be sentenced in not less than two, no more than 30 days or you may waive that right and ask for presentence report. What is your desire in that regard?

MR. MURPHY: Your Honor, I spoke with Mr. Sessions, I've spoke with him about the desirability of obtaining a presentence report and the fact that obtaining a presentence report it would aid the Court in its decision making process and that without a presentence report there is a likelihood that the defendant will be incarcerated and probably the point of incarceration would be the Point of the Mountain. Nonetheless, however, it is Mr. Sessions' desire to get it over with and to be sentenced today.

THE COURT: Is that what you would like to do, Mr. Sessions?

MR. SESSIONS: Yes, it is.

THE COURT: Do you have a prior record, Mr. Sessions?